No. 89-1949

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In The

Supreme Court of the United States

October Term, 1989

EDWARD TILGHMAN, et al.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF THE CASE

The respondent agrees with the petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT A RESERVIST HAS AN ABSOLUTE RIGHT TO MILITARY LEAVE UNDER 38 U.S.C. SECTION 2024(D) IS IN ACCORD WITH PRIOR SUPREME COURT HOLDINGS AND DOES NOT WARRANT SUPREME COURT REVIEW.

The Fourth Circuit's holding is in accordance with the Veterans Reemployment Rights Act ("VRRA") which provides that any employee of a state or a political subdivision thereof "shall be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States." 38 U.S.C. Section 2024(d). In Monroe v. Standard Oil Company, 452 U.S. 549 (1981) this Court discussed employers' responsibilities under the VRRA, particularly relating to an assertion that employers should make reasonable attempts to schedule around reservists' obligations. Monroe stood for the proposition that the only requirement which Congress explicitly set forth was that employers should provide a leave of absence to reservists whose duties force them to miss time at work. Id. at 565-

66. Significantly, throughout this Court's discussion of the Congressional mandate to employers to provide leaves of absences, the Court never mentioned or even implied that such leaves were subject to a reasonableness requirement. To the contrary, the Monroe Court stated:

> This Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress. If Congress desires to amend § 2021(b)(3) to require special work-hour scheduling for military reservists where it is reasonably possible, it is free to do so. But we must deal with the law as it is.

Id. at 566.

The Baltimore Police Department claims that a reasonableness standard should be applied in deciding reservist's requests for leave. However, it relies on case law with

significantly different facts from the instant case. The first of these cases, Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), was decided several months prior to the Supreme Court decision in Monroe, which can be seen as modifying the Lee interpretation of the VRA.[1] The remaining cases which the Department cited are inconsistent with the Supreme Court's holding in Monroe. No writ of certiorari was sought in either Eidukonis v. Southeastern Pennsylvania Transportation Authority, 873 F.2d 658 (3rd Cir. 1989) or Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), and they are left

[1]A Writ of Certiorari was not sought in Lee.

an anomalous result in view of Monroe. The Department's claim that there is a conflict between the circuits is true only to the extent that conflict exists between the cases which it cites and the reasoning of Monroe, which the Fourth Circuit has adopted.

The unjustified threat of termination prevented Kolkhorst from exercising his statutory right to remain in the reservists. The Fourth Circuit correctly stated that this was an impermissible encroachment upon the normal incidents and advantages of employment. (Petitioner's Appendix at p. 11a). Clearly, the Department's policy of limiting the number of reservists to one hundred serves to indiscriminately prevent anyone over the Department-set limit from joining the military reserves. This policy is

contrary to the intent of the VRRA.

II. THE FOURTH CIRCUIT'S HOLDING DOES NOT CREATE A JUDICIALLY UNMANAGEABLE CONFLICT BETWEEN THE CIRCUITS AS THE FACTS OF THIS CASE COMPORT WITH THE REASONABLENESS TEST ADOPTED BY OTHER CIRCUITS.

The Department claims that its reservist policy is subject to a reasonableness standard of review and that under such a standard Kolbrook's application is unreasonable. The Department relies on cases where the reasonableness standard applied is essentially a bad faith test of the actions of the employee applying for the reservists. In fact, the Plaintiff police officer was denied extension of his leave because he failed to inform the Department of his efforts to extend his training and only notified them after

the extension had been secured, indicating bad faith in his behavior regarding the department. The court found his request unreasonable because of this bad faith behavior. 616 F.2d at 605. In Gulf States Paper Corp. v Ingram, 811 F.2d 1464 (11th Cir. 1987) the reasonableness test applied considered only one factor, the employee's conduct. The court rejected any consideration of burden to the employer in deciding the reasonableness of the request, restricting its decision to consideration of whether the plaintiff "acted in a wholly forthright and good faith manner." Id. at 1470.

In Eidukonis v. Southwestern Pennsylvania Transportation Authority, 873 F.2d 688, 694 (3rd Cir. 1989) the court stated that the reasonableness of all of the circumstances of the

appropriate test. However, the facts of the case clearly indicated abusive behavior by the employee which constituted bad faith sufficient to warrant the finding of unreasonableness. The employee had taken over seventeen months military leave over a period of four years, taking the first of the leaves, consisting of a five month tour, only one week after being hired. Id. at 690.

The Department claims that it is necessary to apply a reasonableness test which consequently precludes Kolkhorst from joining the reserves. This is contrary to the language of the VRRA. Even so, by applying the reasonableness standard of these other circuits Kolkhorst's actions would still be reasonable under the test which purportedly gives rise to this conflict

between the circuits. The Fourth Circuit explicitly stated that "even if a standard of reasonableness were applied to Section 2024(d)... Kolkhorst's request for training leave was reasonable," and the Department's policy is "unreasonable per se under any possible formulation of the test." (Petitioner's Appendix at p. 20a) The Department attempts to distinguish its situation from that of employers outside the field of public safety in order to prove that they are not violating the VRRA per se. However, they have failed to distinguish their situation or to provide any factual evidence of the harmful effect of complying with the VRRA's mandatory language. In fact, a survey of twenty-one other comparable city police departments submitted to the district court indicated that the

Maryland State Police is the only department with a limit on the number of officers who can be reservists.

The facts of this case do not warrant Supreme Court review. Upon examination of the factual basis of the other circuits' reasonableness determinations, the facts of this case fit within those parameters and any apparent conflict is readily resolved. Moreover, Monroe is the authoritative decision with which the Fourth Circuit has complied.

The Department also sets forth a new claim that the summary judgment disposition was erroneous. (Petition for Writ of Certiorari, p. 18) It incorrectly attributes the summary judgment disposition to the Fourth Circuit, while in fact this disposition occurred at the trial court level. The

Department claims that there were triable issues of fact concerning the reasonableness of the request for leave. If the Department desired to allege factual disputes existed, it should have raised this claim at the trial court level; in fact, no such claim was made. This is not the appropriate forum in which to make such allegations for the first time. At the trial court level both parties were proceeding in a summary fashion, which would indicate that there were no factual disputes. Both parties moved for summary judgment. The only facts presented at that time were Kolkhorst's, which were sworn to in Affidavits. The Department relied upon conclusory statements of opinion, void of any factual or evidentiary basis, and Kolkhorst continually pointed this out to the trial court. Not only is the

Department precluded from raising this new argument at this juncture, but also there were no prior allegations of such factual disputes.

CONCLUSION

For the foregoing reasons, the respondent Eric Kolkhorst requests that the petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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